

1
2
3
4
5
6
7
8 IN THE UNITED STATES DISTRICT COURT
9 FOR THE EASTERN DISTRICT OF CALIFORNIA

10 JOANNE R. SCHEAFNOCKER,

11 Plaintiff,

No. CIV S-05-2002 DFL EFB PS

12 vs.

13 COMMISSIONER OF INTERNAL
14 REVENUE

Defendant.

ORDER

15 _____/
16 This action, in which plaintiff is proceeding pro se, was referred to the undersigned
17 pursuant to Local Rule 72-302(c)(21). Presently before the court is defendant's request for a
18 partial stay of this action pending ruling by the Supreme Court in *EC Term of Years Trust v.*
19 *United States* (Case No. 05-1541). Plaintiff has filed no opposition to the request.

20 Plaintiff commenced this action in October 2005, alleging that the IRS wrongfully levied
21 funds from a bank account jointly held by her and her ex-husband, Fred Scheafnocker, at
22 National City Bank of Pennsylvania. The levy was issued by the IRS to collect trust fund
23 recovery penalties under IRC § 6672 assessed against Mr. Scheafnocker. Plaintiff alleged that
24 the IRS improperly seized her property to satisfy the tax liabilities of another, i.e., her ex-
25 husband. Defendant argued for dismissal on grounds that the court lacked subject matter
26 jurisdiction over this action because plaintiff's exclusive remedy for recovery of the seized funds

1 was a wrongful levy action under 26 U.S.C. § 7426, and that any such claim was barred by the
2 applicable statute of limitations. On March 28, 2007, the district judge adopted the magistrate
3 judge's findings and recommendations and denied defendant's Rule 12(b)(1) motion to dismiss.¹

4 In denying defendant's motion, the court acknowledged that, apart from the Ninth
5 Circuit, "all other circuits that have considered the issue have determined that § 7426 is the
6 exclusive remedy for third party wrongful levy claims." See Order (Doc. No. 38). However, the
7 Ninth Circuit's contrary ruling in *WWSM Investors v. United States*, 64 F.3d 456 (9th Cir. 1995)
8 is controlling here. Under *WWSM Investors*, a non-taxpayer third party may, in addition to
9 bringing a claim for wrongful levy under § 7426, pursue an action for refund under 28 U.S.C. §
10 1346(a)(1) seeking recovery of property wrongfully seized by the IRS. The Supreme Court has
11 recently resolved that split of authority.

12 On October 27, 2006, the Supreme Court granted *certiorari* in *EC Term of Years Trust v.*
13 *United States*, 434 F.3d 807 (5th Cir. 2006), to determine whether a person who is not the
14 assessed taxpayer can utilize 28 U.S.C. § 1346 to seek a refund when its funds were seized
15 through a wrongful levy and it had an opportunity to utilize the wrongful levy procedures under
16 26 U.S.C. § 7426. *EC Term of Years Trust v. United States*, 434 F.3d 807 (5th Cir. 2006), *cert.*
17 *granted*, 127 S. Ct. 467 (2006). On April 30, 2007, the Court issued an opinion affirming the
18 Fifth Circuit's holding that section 7426(a)(1) provides the exclusive remedy for third-party
19 wrongful levy claims.

20 Accordingly, defendant's request for a stay pending the Court's decision in *EC Term of*
21 *Years Trust*, is denied. Based on the Court's apparently dispositive ruling in that case, the
22 undersigned hereby orders the parties to provide briefing as to the effect of that ruling on this
23 action. Defendant shall file an appropriate motion and supporting brief within forty-five days of
24

25 ¹ Those findings and recommendations were issued by Magistrate Judge Gregory G.
26 Hollows on June 21, 2006. The case was subsequently reassigned to the undersigned on August
29, 2006.

1 the date of service of this order. Plaintiff shall file an opposition thereto within fourteen days
2 thereafter. Defendant may file a reply within five days following plaintiff's filing of her
3 opposition, if any. Upon filing of the reply brief, or if none is filed within five days after
4 plaintiff's filing of her opposition, the matter will be deemed submitted on the papers, and no
5 hearing will be scheduled unless later determined to be necessary by the court. E.D. Cal. L.R.
6 78-203(h).

7 In accordance with the foregoing, IT IS ORDERED that:

8 1. Defendant's request for a stay is denied;

9 2. Defendant shall file within forty-five days of service of this order an appropriate
10 motion and supporting brief addressing the effect of the Supreme Court's decision in *EC Term of*
11 *Years Trust v. United States*, No. 05-1541 (Apr. 30, 2007), on this action. Plaintiff shall file any
12 opposition within fourteen days thereafter. Any reply by defendant shall be filed within five
13 days after filing of plaintiff's opposition, at which time the matter will deemed submitted on the
14 papers, and no hearing will be scheduled unless later deemed necessary by the court. E.D. Cal.
15 L.R. 78-203(h); and

16 3. The parties shall be limited in their discovery efforts, if any, only by the Federal Rules
17 of Civil Procedure.

18 DATED: May 1, 2007.

19 
20 EDMUND F. BRENNAN
21 UNITED STATES MAGISTRATE JUDGE
22
23
24
25
26